6-0210-15114-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DIVISION OF ADMINISTRATION
BUILDING CODES AND STANDARDS DIVISION

In the Matter of the Proposed Rules Governing the Administration of the State Building Code, Minnesota Rules, Chapter 1300

REPORT OF THE ADMINISTRATIVE LAW JUDGE

A public hearing in this matter was held before Administrative Law Judge Allan W. Klein on December 9, 2002, in St. Paul, Minnesota. The hearing continued until all interested persons, groups and associations had an opportunity to be heard concerning the proposed rules.

The hearing and this report are part of a rule-making process that must occur under the Minnesota Administrative Procedure Act[1] before an agency can adopt rules. The legislature has designed this process to ensure that State agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable, that they are within the agency's statutory authority, and that any modifications to the proposed rules made after their initial publication do not result in rules that are substantially different from those which were originally proposed.

The rule-making process also includes a hearing, when a sufficient number of persons request one. The hearing is intended to allow the agency and the Administrative Law Judge to hear public comments regarding the impact of the proposed rules and what changes might be appropriate. The Administrative Law Judge is employed by the Office of Administrative Hearings, an agency independent from the Division of Administration.

Amy E. Kvalseth, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, MN 55103-2106, appeared on behalf of the Building Codes and Standards Division (hereinafter "Division"). Others representing the Division at the hearing were Stephen P. Hernick, Mike Godfrey, David Krings, Doug Nord, and Colleen H. Chirhart. Approximately 50 persons attended the hearing, and 40 of them signed the hearing register.

After the hearing ended, the Administrative Law Judge kept the record open for the maximum 20 calendar days, until December 30, 2002, to allow interested persons and the Division an opportunity to submit written comments. Following the initial

[1] Minn. Stat. § § 14.131 through 14.20 (2002).

comment period, the Administrative Procedure Act requires that the hearing record remain open for another five business days to allow interested parties and the Division to respond to any written comments. The hearing record closed for all purposes on January 7, 2003.

SUMMARY OF CONCLUSIONS

The Division has demonstrated that the rules, as proposed, are needed and reasonable. There are no procedural problems that prevent them from being adopted. Some of the rules that drew criticism are reenactments of existing rule and are thus not open for review.

Based upon all of the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On July 10, 2000, the Division published a Request for Comments on Planned Amendments to Rules Governing the Minnesota State Building Code in the State Register at 25 *State Register* 62.[2]. Among the suggested rule amendments identified in that notice was the adoption of "an administrative chapter to address building code administration for the State Building Code and rules to clarify the duties of Building Officials for administration of the building Division."[3]

2. By a letter dated October 3, 2002,[4] the Division petitioned the Chief Administrative Law Judge to omit the text of the proposed rules from publication in the State Register pursuant to Minn. Stat. § 14.14, subd. 1a(b).[5] The Division estimated that the cost of publication of its entire package of building code rules (seven codes, including the Administration of the Building Code) would be approximately $12,000.[6]

3. In a letter dated October 9, 2002, the Chief Administrative Law Judge approved the agency's petition to omit the text of proposed rules from publication in the State Register.[7]

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[2] Ex. A.
[3] *Id*.
[4] Ex. J.
[5] Minnesota Statutes section 14.14, subdivision 1a(b) provides that:

> The chief administrative law judge may authorize an agency to omit from the notice of rule hearing the text of any proposed rules, the publication of which would be unduly cumbersome, expensive, or otherwise inexpedient if: (1) knowledge of the rule is likely to be important to only a small class of persons; (2) the notice of rule hearing states that a free copy of the entire rule is available upon request to the agency; and (3) the notice of rule hearing states in detail the subject matter of the omitted rule, cites the statutory authority for the proposed rule, and details the proposed rule's purpose and motivation.

[6] Ex. J.
[7] *Id*.

4. By a letter dated October 8, 2002, the Division requested that the Office of Administrative Hearings schedule a rule hearing and assign an Administrative Law Judge. The Division also filed a proposed Dual Notice of Intent to Adopt Rules Without a Public Hearing, a copy of the proposed rules and a draft of the Statement of Need and Reasonableness (SONAR).[8] The Board asked for prior approval of its additional notice plan.

5. In a letter dated October 8, 2002, the Administrative Law Judge approved the Dual Notice. In a letter dated October 15, 2002, the Administrative Law Judge approved the additional notice plan.

6. On October 21, 2002, the Division published its Notice of Intent to Adopt Rules Without a Public Hearing, Unless 25 or More Persons Request a Hearing, and Notice of Hearing if 25 or More Requests for Hearing are Received (Dual Notice), at 27 *State Register* 567-568.[9]

7. On October 17, 2002, the Division mailed the Dual Notice to all persons and associations who had registered their names with the agency for the purpose of receiving such notice and to all persons identified in the additional notice plan.[10]

8. On October 18, 2002, the Division mailed the Dual Notice and the Statement of Need and Reasonableness to the legislators specified in Minn. Stat. § 14.116.[11]

9. On October 18, 2002, the Division mailed a copy of the Statement of Need and Reasonableness to the Legislative Reference Library.[12]

10. On the day of the hearing the following documents were placed in the record:

A. The first Request for Comments published in the State Register.[13]

B. A second Request for Comments published on August 6, 2001, at 26 *State Register* 124.[14]

C. The proposed rule, as approved by the Revisor of Statutes.[15]

D. The Statement of Need and Reasonableness (SONAR).[16]

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[8] Ex. D.
[9] Ex. F.
[10] Exs. G and H.
[11] Ex. K.
[12] Ex. E.
[13] Ex. A.
[14] Ex. B. This second notice is not specifically required in rulemaking, but is fully within the discretion of the agency proposing a rule.
[15] Ex. C.
[16] Ex. D.

E. A copy of the certificate and transmittal letter showing that the agency sent a copy of the SONAR to the Legislative Reference Library.[17]

F. The Dual Notice as mailed and published in the State Register.[18]

G. Certificate of Mailing the Dual Notice and the Certificate of Accuracy of Mailing List.[19]

H. Certificate of Mailing to Additional Notice recipients.[20]

I. Written comments on the proposed rule received by the Division during the comment period.[21]

J. Division's petition for omission of the rule language from publication in the State Register and Chief Administrative Law Judge's approval of petition.[22]

K. Certificate of Mailing Notice to Legislators.[23]

L. Notice of Hearing sent to those persons who had requested a hearing and the mailing list of those persons.[24]

Nature and History of the Proposed Rules

11. The State Building Code is composed of several model codes with differing administrative provisions.[25] The Division concluded that a single administration chapter was needed to provide uniform standards to govern the entire State Building Code. Chapter 1300 describes the scope of its application to the various building codes, defines the administrative authority applying the State Building Code, sets out the permit requirements, identifies needed documents, retained language on violations and penalties, set out standards for fees, stop work orders, unsafe buildings, and temporary structures, establish standards for inspections, clarifies how certificates of occupancy are to be issued, and modified the permit appeal process.

Statutory Authority

12. Minn. Stat. § 16B.59 provides, in part, as follows:

[17] Ex. E.
[18] Ex. F.
[19] Ex. G.
[20] Ex. H.
[21] Ex. I. The comments had been previously delivered to the Office of Administrative Hearings on November 26, 2002.
[22] Ex. J.
[23] Ex. K.
[24] Ex. L.
[25] Ex. D, SONAR, at 1.

The State Building Code governs the construction, reconstruction, alteration, and repair of buildings and other structures to which the code is applicable. The Commissioner shall administer and amend a state code of building construction which will provide basic and uniform performance standards, establish reasonable safeguards for health, safety, welfare, comfort, and security of the residents of this state and provide for the use of modern methods, devices, materials, and techniques which will in part tend to lower construction costs. The construction of buildings should be permitted at the least possible cost consistent with recognized standards of health and safety.

13. Minn. Stat. § 16B.61, subd. 1, provides, in part, as follows:

Subject to Sections 16B.59 to 16B.75, the Commissioner shall by rule establish a code of standards for the construction, reconstruction, alteration, and repair of buildings, governing matters of structural materials, design and construction, fire protection, health, sanitation, and safety, … The code must confirm insofar as practicable to model building codes generally accepted and in use throughout the United States, including a code for building conservation. … Model codes with necessary modifications and statewide specialty codes may be adopted by reference. The code must be based on the application of scientific principle, approved tests, and professional judgment. To the extent possible, the code must be adopted in terms of desired results instead of the means of achieving those results, avoiding whenever possible the incorporation of specifications of particular methods or materials. To that end the code must encourage the use of new methods and new materials … .

14. Minn. Stat. § 16B.64, subd. 6, states:

The commissioner shall approve any proposed amendments deemed by the commissioner to be reasonable in conformity with the policy and purpose of the code and justified under the particular circumstances involved. Upon adoption, a copy of each amendment must be distributed to the governing bodies of all affected municipalities.

Impact on Farming Operations

15. Minn. Stat. § 14.111 imposes an additional notice requirement when rules are proposed that affect farming operations. The statute requires that the agency provide a copy of the proposed rules to the Commissioner of Agriculture 30 days prior to the publication of the proposed rule in the State Register. In this particular case, the Division did not give the required notice to the Commissioner of Agriculture because it concluded the rules do not affect farming operations. The Administrative Law Judge agrees with that conclusion.

Regulatory Analysis

16. The Administrative Procedure Act requires an agency adopting rules to discuss six factors in its statement of need and reasonableness. These factors require:

> (1) A description of classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

The Division identified affected persons as including municipal building officials and inspectors, architects and engineers, building contractors, and others. The Division identified municipal building officials and government entities as those who will bear the costs of the proposed rules. The Division identified those who will benefit as including building officials and inspectors; contractors, installers and design professionals; building owners and manager; and the general public.

> (2) The probable costs to the agency and any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

The Division indicated that there are no anticipated costs to agencies or anticipated effect on state revenues (other than the indirect impacts resulting from making construction less costly overall).

> (3) A determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

The Division assessed the rule as proposed as making construction less costly. No other assessment of alternative methods was provided.

> (4) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and reasons why they were rejected in favor of the proposed rule.

The Division described its method of arriving at the proposed rules as taking the rule provisions from "various documents."[26] As described elsewhere in the SONAR, the other documents are model codes. Minn. Stat. § 16B.61 mandates that the Division incorporate national model building codes into its rules, and therefore no further alternative methods beyond those considered are needed.

> (5) Probable cost of complying with a proposed rule.

The Division stated that "the only possible cost associated with compliance with this rule is possibly a need for building officials to implement additional procedures or

[26] Ex. D, SONAR, at 4.

documentation."[27] The Division noted that any additional tasks that may appear to be required are already required under existing rules, but are not always implemented.[28]

> (6) An assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

The Division indicated that the only federal regulations that must be considered are those of the U.S. Division of Housing and Urban Development (HUD) governing manufactured homes.[29] The Division indicated that there are no rule provisions that differ from the applicable HUD regulations.

Performance Based Rules

17. The Administrative Procedure Act also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives, but gives maximum flexibility to the regulated party and the agency in meeting those objectives. The Division maintains that its building codes are "for the greatest part, performance-based codes. At least one commentator agreed, stating that the new codes are more performance-based than the old ones.[30]

Additional Notice

18. In addition to the mailed and published notices required by statute, the Division published the proposed rules, Statement of Need and Reasonableness ("SONAR"), and Notice of Intent to Adopt on its website. It also mailed a Notice of Intent to Adopt to all municipal code officials responsible for administration of the State Building Code, as well as officials from other cities, towns and counties who need to be aware of the rules as they apply to public buildings within their jurisdiction. The Division mailed also to members of the Construction Code Advisory Council, and the Metropolitan Council.

19. The Division formed an advisory committee to assist in developing Chapter 1300. The committee included representatives from the Division's Building Codes and Standards Division, the League of Minnesota Cities, a private building code service company, and several municipal building officials.[31]

Rulemaking Legal Standards

[27] Ex. D, SONAR, at 4, and Tr., p. 14..
[28] *Id*.
[29] Ex. D, SONAR, at 4.
[30] Ex. D, SONAR, at 4, and Testimony of William T. Sutherland, at Tr. pp. 25-26..
[31] Ex. D, SONAR, at 1..

20. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, a determination must be made in a rulemaking proceeding as to whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.[32] The Division prepared a Statement of Need and Reasonableness in support of the proposed rules. At the hearing, the Division primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by Division representatives at the public hearing and in written post-hearing submissions.

21. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.[33] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.[34] A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.[35] The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[36] An agency is entitled to make choices between possible approaches as long as the choice made is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the agency. The question is rather whether the choice made by the agency is one that a rational person could have made.[37]

22. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether the Board has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.[38] In this matter, the Division has proposed several changes to the rule after publication of the rule language in the State Register.[39] Because of this circumstance,

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[32] *Mammenga v. Division of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).
[33] *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).
[34] *Greenhill v. Bailey*, 519 F. 2d 5, 19 (8th Cir. 1975).
[35] *Mammenga*, 442 N.W.2d at 789-90; *Broen Memorial Home v. Minnesota Division of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).
[36] *Manufactured Housing Institute*, 347 N.W.2d at 244.
[37] *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).
[38] Minn. R. 1400.2100.
[39] These were available as a handout at the hearing, and were explained by Stephen Hernick at Tr. 15-20.

the Administrative Law Judge must determine if the new language is substantially different from that which was originally proposed.[40]

23. The standards to determine if new language is substantially different are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if "the differences are within the scope of the matter announced … in the notice of hearing and are in character with the issues raised in that notice," the differences "are a logical outgrowth of the contents of the … notice of hearing and the comments submitted in response to the notice," and the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question." In determining whether modifications make the rules substantially different, the Administrative Law Judge is to consider whether "persons who will be affected by the rule should have understood that the rulemaking proceeding … could affect their interests," whether "the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the … notice of hearing," and whether "the effects of the rule differ from the effects of the proposed rule contained in the … notice of hearing."[41]

Analysis of Proposed Rules

General

24. This report is limited to discussion of the portions of the proposed rules that received significant comment or otherwise need to be examined. When proposed rules are adequately supported by the SONAR or the Division's oral or written comments, a detailed discussion of them is unnecessary. Moreover, when there are no comments attacking a proposed rule, the Administrative Law Judge has no basis in the record to discuss them, other than repeating what the agency has said in the SONAR. That will not be done. Instead, the Administrative Law Judge now finds that the agency has demonstrated the need for and reasonableness of all the rule provisions not specifically discussed in this report. All the rule provisions not specifically discussed in this report are found to be authorized by statute, and there are no other problems with them that would prevent their adoption.

Discussion of Proposed Rules by Part

Part 1300.0130 – Construction Documents

25. Proposed rule 1300.0130 sets out the requirements for submitting documentation on projects for which a permit is sought. The initial filing requirement is set out in subpart 1, which states:

> Subpart 1. **Submittal documents.** Construction documents, special inspection and structural observation programs, and other data shall be submitted in one or more sets with each application for a permit.

[40] Minn. Stat. § 14.15, subd. 3.
[41] *Id.* § 14.05, subd. 2.

> Exception: The building official may waive the submission of construction documents and other data if the nature of the work applied for is such that reviewing of construction documents is not necessary to obtain compliance with the code. The building official may require that the plans or other data be prepared according to the rules of the Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience and Interior Design, chapter 1800, and Minnesota Statutes, sections 326.02 to 326.15, and other state laws relating to plan and specification preparation by occupational licenses. If special conditions exist, the building official may require additional construction documents to be prepared by a licensed design professional.

26. The most contentious issue in this proceeding surrounds the phrase "may require that the plans or other data be prepared according to the rules of the Board of Architecture …". Many architects and engineers, along with the Board and some building officials, asserted that the language is defective, since the subpart allows building officials to accept plans and specifications prepared by persons other than licensed engineers and architects, and contains no guidelines to limit the building official's unbridled discretion.. The Division indicated in its SONAR that "the word 'may' was used because the Division does not intend to make the building official responsible for the Board's enforcement of Minnesota Rules, chapter 1800."[42] In it's post-hearing response to the critics, the Division noted that the language is already a part of the existing code, at Minn. Rule pt. 1305.0106, subpt. 2.[43]

27. The Minnesota Court of Appeals has just concluded that, under existing law, building officials are not required to reject plans prepared by unlicensed individuals.[44] In that case, The National Society for the Preservation of Engineering and Architecture petitioned the District Court for a writ of mandamus to compel certain building officials to issue permits only when plans had been prepared by licensed engineers and architects. The District Court denied the Society's petition, on the grounds that building officials had no legal duty to enforce the certification and signing requirements of the Licensing statutes. The Society appealed that ruling to the Court of Appeals. The Court of Appeals affirmed the decision. In arriving at this conclusion, the Court of Appeals stated:

> Minnesota's Uniform Building Code (UBC) was enacted in 1984 pursuant to Minn. Stat. § 16B.61. Under section 16B.61, the commissioner of the Division of Administration is charged with enforcing and administering the UBC with regard to state and public facilities. Minn. Stat. § 16B.61, subd. 1a. (2002). Municipalities administer the UBC for state and public buildings through contractual agreement with the commissioner. *Id.* According to the UBC, state and municipal building officials are directed to enforce all provisions of the UBC. UBC § 104.1, 104.2.1 (1997). Building

[42] Ex. D, SONAR, at 17.
[43] Letter from Tom Joachim, dated December 30, 2002, at pp. 2-4.
[44] *NSPEA, Inc., d/b/a National Society for the Preservation of Engineering and Architecture v. Minnesota Division of Administration, Consulting Engineering Council of Minnesota, and City of Maple Grove, et al*., (C0-02-895, C8-02-918, and C3-02-986), (Minn. App. January 21, 2003, unpublished).

> officials derive their power from, and their duties are described in, the UBC. *See* Minn. Stat. § 16B.61, subd. 1a.; *see also* UBC § 104. Under the UBC, building officials are not empowered or directed to enforce, in any way, the licensing requirements of Minn. Stat. § 326.03-.15. *See* UBC, § 101. The inescapable conclusion is that state and municipal building officials are not required or duty-bound to enforce the licensing requirements of section 326. Mandamus will lie only where the law clearly and affirmatively imposes a duty upon an official. *Pole v. Trudeau*, 516 N.W.2d 217, 219 (Minn. App. 1994). Because no such mandated duty is imposed upon state and local building officials, the district court did not err in concluding that appellants had failed to meet the duty element of the mandamus test.[45]

But the Court of Appeals (like the District Court) was sympathetic to the public policy questions raised by the current state of the law. The Court of Appeals noted:

> It is not disputed that state and local building officials routinely issue building permits for plans that were not prepared by licensed individuals, technically in violation of the statute. Although Minn. Stat. § 326.02, subd. 1 states that, in the interest of safeguarding "life, health, and property, and to promote the public welfare," any persons practicing architecture or engineering by designing plans for public or private buildings must be licensed or certified according to §§ 326.02-.15, building officials are not charged with enforcing this requirement. According to the UBC, which guides their conduct, building officials *may* reject plans prepared by unlicensed or uncertified persons, but are not required to do so. UBC § 106.3.2 (emphasis added). Appellants' concern is that the intent of section 326.02—ensuring safety—is thwarted when unlicensed or uncertified individuals submit plans and receive building permits. There is at least a hint in the record before us that large, complex projects on compressed timelines may be proceeding without the protections inherent in professional-licensing statutes. But the legislature has directed that these potentially worrisome circumstances are within the purview of the licensing board and has not chosen to require that building officials participate in licensing-enforcement decisions.[46]

28. The holding in *NSPEA, Inc.,* is clear that the absence of a licensed architect or engineer submitting the plan does not **require** that the plan be rejected. But the scope of discretion provided to the building official by subpart 1 extends beyond that situation. The rule language states that "the building official may require that the plans or other data be prepared according to the rules of the Board of Architecture…" but the rule language does not say why or when the additional requirement may be imposed. Therefore the building official is afforded complete discretion as to whether or not require any particular permit applicant to submit plans from a licensed engineer or

[45] *NSPEA, Inc., supra*.
[46] *NSPEA, Inc., supra,* at fn. 2 (emphasis added).

architect. Identical applications from two different persons to the same building official can be treated differently without violating any portion of the proposed rules. Similarly, these rules authorize a building official to approve a complicated application without plans from a licensed engineer or architect, but to require such plans from an applicant with a simple project proposal. And, perhaps most importantly from a practical standpoint, a building official in City A may require certified plans for a given project, but a building official in the adjoining city, City B, may not require them for the same project. There is definitely a cost associated with obtaining plans from a licensed professional, and if it is known that City B is more lenient, a builder might well try to convince City A's building official that the project might move if professional plans are insisted upon. Of course, there are many factors that influence a builder's choice of location, and the cost of professional plans may well be a very minor consideration. But the builder can threaten, and the building official (or the official's superiors) may believe the threat. As one building official stated, "It is very difficult being the larger jurisdiction surrounded by smaller jurisdictions with less staff that don't as closely enforce the registration laws as I do because I'm constantly put upon, you're the only place that I have to do this…".[47] For all of the foregoing reasons, if the Division were proposing this subpart for the first time, as new rule language, it would have a difficult time convincing the Administrative Law Judge that it could be adopted without the addition of significant limitations to guide the building official's discretion. But this rule is not being proposed for the first time. Instead, it is existing language that is not being changed in this proceeding.[48]

29. Minn. Rule part 1400.2070, subpart 1, provides, in pertinent part, as follows:

> If an agency is amending existing rules, the agency need not demonstrate the need for and reasonableness of the existing rules not affected by the proposed amendment.

That rule effectively limits the scope of what is "fair game" for public comment and ALJ review. They are limited to items which the Division is proposing to amend or add. As a leading treatise on the subject has stated:

> A question sometimes arises in rulemaking proceedings about what burden the agency must bear in regard to need and reasonableness when it amends existing rules. Amendments of rules are specifically included within the statutory definition of a rule.

[47] Testimony of Duane Lasley, at Tr. pp.65-66.

[48] The concepts, and most of the wordage, appears in existing rule in one place or another. Despite reorganization and minor rewording, the concepts are not new. They are already in existing rule. The key provision at issue is taken directly from existing rule, Minn. Rule part 1305.0106, subpt. 2. That was adopted in 1995. It was changed from "shall" to "may" after the requests for a hearing were withdrawn, so it has never before been the subject of a public hearing. Nonetheless, it is an existing rule.

> Therefore, amendments must be shown to be needed and reasonable by an affirmative presentation of facts. However, pursuant to an OAH rule, the agency is not required to demonstrate the reasonableness of existing rules' subsections that are not affected by the proposed amendments, even though the existing rules may be in close proximity to the amendments.[49]

30. In the case of "may" versus "shall" regarding the submission of professionally prepared documents, the language is existing language, not being conceptually amended in this proceeding, and thus it is not "fair game" for ALJ review. The Division may adopt it, as amended (reorganized).

Part 1300.0110, Subpart 13 – Recordkeeping for Alternatives

31. As proposed by the Division, this rule would allow a building official to approve the substitution of alternative materials, designs, or methods of construction if the official finds that the proposed alternative meets certain standards specified in the rule. Larry Whitcomb, of NSPEA, noted that the rule did not contain any recordkeeping requirement that would preserve the rationale and reasoning behind a building official's decision to allow a proposed substitution.[50] He noted that the parallel UBC section requires that "The details of any action granting approval of an alternate shall be recorded and entered in the files of the code enforcement agency." He also pointed to an identical provision in the immediately-preceding paragraph of the proposed rules, which allows for modifications in certain situations, but requires that the details of the modification be recorded in the records.[51] He suggested that the rule allowing substitutions should also require documentation. The Division agreed that official actions should be documented, and accepted Whitcomb's suggestion "if it would not be considered a major change".[52] No person responded to the Division's position. The Administrative Law Judge finds that the proposed addition of language requiring documentation of allowed substitutions would not make the rule "substantially different" as defined in finding 23, above, and that the rule may be adopted with the addition. It is not required that the addition be made, but it would be an improvement to the rule if it were added.

Proposed Rule 1300.0120 – Exemption from Permitting for Certain Electrical Work

32. Part 1300.0120 sets forth the basic requirement that a permit must be obtained in order to do certain kinds of work on a building or structure, including the

[49] Beck, Minnesota Administrative Procedure, (Weekend Publications, 2nd Ed., 1998), § 22.2 at p. 344.
[50] Testimony of Larry Whitcomb, at Tr. Pp. 46-48. See, also, his letter of December 27, 2002, at p.2.
[51] See, Proposed part 1300.0100, subpt. 12.
[52] Letter from Tom Joachim, dated December 30, 2002, at p. 4.

installation or repair of any electrical system. But subpart 4 of the rule sets forth exemptions from the permitting requirement, including: "An electrical permit is not required if work is inspected by the State Board of Electricity or is exempt from inspection under Minnesota Statutes, section 326.244." Larry Whitcomb, David Exe, Jake Cain, Troy Adams, and Leroy Peickert all disagreed with parts of this exemption, on the grounds that the inspections performed by or under the auspices of the Board of Electricity are limited to inspecting for compliance with the National Electrical Code, and that there are many parts of a building's electrical system that are beyond the scope of the NEC. [53]

33. The exemption language proposed by the Division is new language. It was intended to prevent a builder from having to obtain two approvals (and pay two fees) for the same work. The work covered by the Board of Electricity's inspection process includes matters such as panel sizes and feeder sizes. The Board regulates how wires are brought to, and connected to, various items of electrical equipment. But it does not regulate matters such as the location and number of smoke detectors, fire alarms, emergency lighting, exit signs, and similar items, even though they are electrically powered. Those devices must also be planned, permitted, and inspected under the building code. The Division's proposed exemption is not intended to affect the scope of the regulation of fire alarms, etc. by building officials at all. It appears that most of the time, a builder will have to obtain two approvals for the same building – one from the Board of Electricity (or section 326.244 authority) for the NEC-type work, and another from the building code official for the non-NEC work, such as the location and number of smoke detectors, fire alarms, and similar items.

34. Some of the commentators fear that the proposed exemption implies that if a builder gets a Board of Electricity approval, he can then ignore the provisions of the building code relating to fire alarms, for example. That was not the intent of the Division. The Division's intent can be better expressed by the following:

> An electrical permit is not required for work that is inspected by the State Board of Electricity or is exempt from inspection by Minnesota statutes, section 326.244. But this exemption is only for work within the scope of the Board's jurisdiction, and the exemption does not extend to matters that are not within the scope of the Board's jurisdiction.

That language would limit the scope of the exemption to work that is actually inspected by the Board (or covered by 326.244), and that language would be one possible way to avoid misinterpretation. The Division may be able to devise better language to achieve the same result. What should be clear is that it is not necessary to get two approvals for the same *work*, but having just one does not mean that all aspects of a particular device are covered.

[53] See, generally, Tr. p. 40,and pp. 76-82.

35. The Administrative Law Judge recommends that the Division improve the language in the exemption, but he doers not require it. The exemption can be adopted as proposed, but it's language could be improved along the lines suggested without the new language being deemed "substantially different" than the original proposal.

Proposed Rule 1300.0230 – Board of Appeals

36. Minn. Stat. 16B.63 recognizes both local level and state level building code boards of appeal. Proposed Rule 1300.0230 sets forth a number of details concerning the local boards, including one provision that was criticized at the hearing as being unreasonable, at least in Greater Minnesota.

37. Proposed subpart 1 would require that the local board must hold a hearing within ten business days after receiving an appeal. Proposed subpart 4 requires that the board of appeals consist of members who are qualified by experience and training to pass on matters pertaining to building construction, and that they can not be employees of the affected jurisdiction. One commentator[54] said that it is hard to get busy professionals to donate their time, and they can not be expected to be available with only a few day's notice. He feared that he might not be able to get a quorum together on short notice. He said that some jurisdictions (both large and small) have established a regular schedule of monthly meetings to avoid this problem. But monthly meetings would not satisfy the proposed rule. He also noted that some boards publish notice of their meetings in a local paper, but unless the community has a daily paper, the proposed ten day notice would make it impossible to publish a notice. Finally, he noted that often the appeal board will be need to research a question in advance of a meeting, and short notice meeting would make that more difficult. He recounted that sometimes he will ask the division staff for a written opinion in advance of a local board meeting, and the proposed rule would make it impossible to get a response in time for the meeting.

38. In the SONAR, the Division explained that it was proposing the ten-day rule in response to complaints from contractors regarding the length of time it takes to file an appeal. After hearing the complaint from Mr. Lasley, the Division staff responded that it was attempting to set up regional, multi-jurisdictional appeals boards, so than an appeal could be heard "at some board" within the ten-day time frame. The staff explained that if the appeal arises during construction, the builder needs a fast hearing because delay may be so costly that the builder will be forced to abandon the appeal.

39. The Administrative Law Judge finds that the Division has justified the reasonableness of its proposed rule, although the record would also support some relaxation of the ten days. Perhaps the ten day requirement could be limited to cases where the appellant is willing to state, in writing, that an urgent hearing is needed. The record would support some change along that line as well. The Division is in the best

[54] Testimony of Duane Lasley, City of Duluth, at Tr. pp.66-71.

position to balance the concerns of the builders against the realities faced by officials in Greater Minnesota.[55]

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Division gave proper notice of the hearings in this matter.

2. The Division has fulfilled the procedural requirements of Minn. Stat. § 14.14, and all of the other procedural requirements of law or rule.

3. The Division has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. § § 14.05, 14.15, and 14.50.

4. The Division has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. § § 14.14, subd. 2 and 14.50 (iii).

5. The various changes to the rules which were suggested by the Division after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published, within the meaning of Minn. Stat. § § 14.05, subd. 2 and 14.15, subd. 3.

6. Any findings that might properly be termed conclusions and any conclusions that might properly be termed findings are hereby adopted as such.

7. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Division from further modification of the proposed rules based upon an examination of the public comments, provided that the rule as finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the proposed rules be adopted.

[55] A building official from Fairmont testified, in connection with another rule, that in his city of 10,000 people, there is only one design professional. Tr. p. 54. Obviously, he faces a more difficult problem than the Duluth official who commented on the rule.

Dated this 7th day of February 2003.

/s/ Allan W. Klein
ALLAN W. KLEIN
Administrative Law Judge

Reported: Transcript Prepared by Mary F. Briody,
Kirby A. Kennedy & Assoc.

NOTICE

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rule(s). The agency may then adopt a final rule or modify or withdraw its proposed rule. If the Division; makes changes in the rule other than those recommended in this report, it must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit it to the Revisor of Statutes for a review of the form of the rule. The agency must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.